



STATE OF ALABAMA
DEPARTMENT OF AERONAUTICS

RSA PLAZA
770 WASHINGTON AVENUE, STE. 544
MONTGOMERY, ALABAMA 36130

DOCKET FILE COPY ORIGINAL

DR. JOHN C. EAGERTON IV
DIRECTOR

TELEPHONE: (334) 242-4480
FACSIMILE: (334) 240-3274

RECEIVED

October 27, 1997

10/28/1997

Mr. William F. Caton, Acting Secretary
Office of the Secretary
Federal Communications Commission
Washington, D.C. 20554

Subject: MM Docket No. 97-182

Dear Mr. Secretary:

By this original letter and thirteen copies, the Alabama Department of Aeronautics submits its strong objection to the adoption of a proposed FCC rule that is the subject of MM Docket No. 97-182.

To qualify this formal objection, this department is authorized by state statute to protect the navigable airspace associated with Alabama's airport system. The Department is expressly empowered to identify and control air navigation hazards that affect aircraft operations during the en route, airport approach, and airport departure phases of flight. Within this statutory framework, the Alabama Department of Aeronautics works closely with municipalities to implement height zoning ordinances intended to protect the airspace in close proximity to their local airports.

Alabama's public use airport system consists of eight (8) commercial service airports, 79 publicly owned general aviation airports and twelve (12) privately owned general aviation airports. In addition, the State of Alabama has 56 heliports under license, 41 of which are located at hospitals.

The Alabama Department of Aeronautics objects to the proposed FCC preemption rule on numerous grounds. First and foremost, the proposed rule is a serious threat to air navigation safety, especially in the vicinity of airports. If adopted by the FCC in its current form, the preemption rule will encourage the construction of tall towers without regard to the effects such structures would have on air navigation. Under the rule, towers could be sited at locations which interfere with air navigation and airport operations, particularly during periods of low cloud ceilings and/or poor visibility. The preemption rule would eliminate any incentive for tower proponents to consider the effects upon air navigation safety in

cc: 13

Mr. William F. Caton, Acting Secretary
October 27, 1997
Page 2

Re: MM Docket No. 97-182

making siting decisions.

A second reason for objection is that the proposed preemption rule would grant unprecedented authority to the FCC concerning tower siting decisions -- authority that even the Federal Aviation Administration (FAA) cannot exercise. The FAA evaluates obstructions to air navigation in accordance with Federal Aviation Regulation (FAR) Part 77. Under FAR Part 77, the FAA does not have the mandated authority to approve or deny the building of structures that pose a hazard to air navigation. When a proposed structure is found to create an air navigation hazard, the FAA simply has no authority to stop its construction. The only action that can be taken by FAA is to restructure the affected airspace to provide a minimum margin of safety for aircraft operations in vicinity of the hazard. For example, FAA must revise the instrument approach procedures used by pilots to navigate to an airport during inclement weather conditions. Often, the procedural changes involve an increase in the minimum altitudes a pilot can descend to on an approach. This has the effect of diminishing the utility of the airport.

Due to the lack of FAA enforcement power, the responsibility to regulate the height and location of potential air navigation hazards has been assumed by state and local jurisdictions. The FAA already is handicapped when dealing with the protection of navigable airspace; the proposed FCC rule would only serve to further erode the FAA's limited role in the air navigation hazard determination process. The proposed FCC preemption rule ignores questions of air navigation safety; nowhere in the proposal can it be found that the FCC would be required (or even allowed!) to consider the effects DTV towers would have on airport operations. For those who must deal with the issue of protecting navigable airspace, the power that will be granted the FCC under the proposed preemption rule is simply unacceptable.

A third basis for objection is that the proposed preemption rule seriously undermines state and local government police powers to regulate and restrict air navigation hazards. Similar to Alabama, many states have adopted legislation and/or implemented regulations that define an air navigation hazard as any structure that endangers the lives and property of airport users and that tends to impair or destroy the utility of the airport. Under Alabama law, air navigation hazards are declared to be contrary to the interest of either public safety or general welfare, two factors that are the very basis of the state's exercise of its police powers. The purpose of the proposed FCC preemption rule is to override and totally disregard a state or local government's ability to regulate the location and height of structures so that they do not pose an air navigation hazard. The state and local government exercise of their police

Mr. William F. Caton, Acting Secretary
October 27, 1997
Page 3

Re: MM Docket No. 97-182

powers to regulate air navigation hazards is implemented through the mechanisms of zoning and land use control. The proposed FCC preemption rule is a clear attack upon the ability of state and local governments to restrict activities that are incompatible with airport operations, safety, and development.

In its discussion of the proposed rule, FCC states that while it is sensitive to the rights of states and localities to protect citizens' interests, there is a precedent for the adoption of rules that preempt local zoning ordinances regarding satellite "dish" antennas and amateur radio towers. It is fallacious to justify adoption of the proposed DTV preemption rule on one previously adopted that deals with residential TV receivers and backyard ham radio transmitter poles. While the present issue deals with air navigation safety, the former concerns neighborhood aesthetics. Because the issues are so fundamentally different, adoption of the DTV preemption rule cannot be defended by such a precedent.

A fourth reason for objecting to the proposed preemption rule is that it would, over time, virtually destroy this state's investment in our air transportation system. Alabama and its local airport owners have made a substantial investment in the development and preservation of its airport infrastructure. In addition, FAA funds have contributed significantly to the expansion and improvement of the state's airports. The amount of this combined federal, state and local investment to develop Alabama's airport system is simply immeasurable. Adoption of the proposed preemption rule would seriously threaten this public investment.

Presently, the public investment in Alabama's airport system is protected by state and local zoning and land use controls. If these tools are taken away by the proposed FCC preemption rule, Alabama and its local governments would be forced to consider alternative means of preserving this public investment. Presumably, other states and their local airport owners would do likewise. It is likely that many affected jurisdictions will file lawsuits against tower proponents to block construction and protect their investment. The prospect of protracted litigation is not in the best interest of any of the parties and would defeat the purpose of the proposed rule.

A fifth reason for objection is that the proposed FCC preemption rule will cause a violation of the grant agreements that have been entered into between the FAA and airports that have received federal airport improvement funds. When an airport applies for grant assistance from the FAA, local officials must sign assurances that the necessary steps will be taken to protect the airport terminal area airspace. To comply with these assurances, local governments have adopted zoning and other land use strategies that are intended to prevent incompatible activities in

Mr. William F. Caton, Acting Secretary
October 27, 1997
Page 4

Re: MM Docket No. 97-182

vicinity of the airports. If adopted, the FCC preemption rule would cause airports receiving federal funds to be in violation of the previous grant assurances required by the FAA. In addition, if towers that penetrate navigable airspace are allowed to be erected under the proposed rule, future FAA grant assistance will be jeopardized and the affected airports will no longer be eligible for federal funding. Consequently, the proposed FCC rule will have a detrimental impact on both the present and future value of affected airports.

A sixth reason for objection concerns the inadequate response times that will be required by state and local governments under the proposed preemption rule. Currently, the Alabama Department of Aeronautics begins an obstruction evaluation only after the FAA has completed its review process under FAR Part 77. Upon notification by the FAA that an aeronautical study is being conducted for a particular structure, this department initiates a coordination process with the affected local government. Due to the increased number of aeronautical studies that are being required due to the siting of cellular communication towers in the vicinity of airports, the FAA's aeronautical studies typically take about sixty (60) days to complete. The response times specified in the proposed preemption rule do not take into account the technical issues that must be addressed and the period that must be allowed for public comment. Moreover, the proposed response times will, in effect, circumvent the federal/state/local coordination process. For these reasons, the proposed response times are not reasonable.

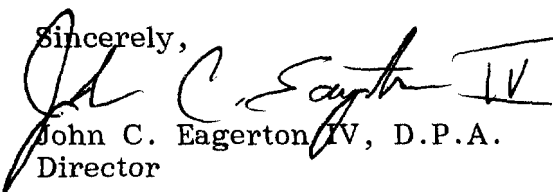
As a final point to consider, a question must be raised concerning the liability risk a tower proponent would be exposed to if an accident occurred involving a structure that has been found to be an air navigation or airport hazard. The provisions of the proposed FCC preemption rule will not cause Alabama (and presumably the FAA and other states as well) to cease following the statutory and regulatory procedures that have been implemented to control structures that are hazardous to air navigation and airport operations. Given such a scenario, it is highly probable that a tower owner would be found liable and forced to pay substantial punitive damages to the injured parties. The proposed FCC rule may ultimately preempt state and local land use/zoning review but it will not preempt the judicial review process and the right of an aggrieved party to go to court.

Mr. William F. Caton, Acting Secretary
October 27, 1997
Page 5

Re: MM Docket No. 97-182

For the reasons stated, the members of the FCC are urged to deny adoption of the proposed preemption rule. Due to the serious implications of the rule, the Alabama Department of Aeronautics will take whatever actions are deemed necessary to protect the navigable airspace from the hazards posed by the construction of DTV transmitter towers.

Thank you for the opportunity to comment on this important issue.

Sincerely,

John C. Eagerton IV, D.P.A.
Director

JCEIV/je

cc: Aircraft Owners & Pilots Association
Alabama League of Municipalities
National Association of State Aviation Officials
Alabama Congressional Delegation